SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1014

JAMES DEAN WALKER,
APPELLANT,

v.

STATE OF ARKANSAS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT.

JOE PURCELL,
Attorney General
Attorney for Appellee

INDEX

	Page
I Self-Incrimination and Pretrial Discovery	2
II Bias and Prejudice of Judge	3
III Comment on Previous Conviction	4
IV Pretrial Publicity	5
V Confrontation With Witnesses	6
VI Suppression of Evidence	7
Conclusion	8

CITATIONS

Cases:

United States *v.* Eli Lilly & Co. 24 F.R.D. 285 (1959, N.J.)	2
United States *v.* Woodner, 28 F.R.D. 22 (1961, N.Y.)	2
Jones *v.* Superior Court of Nevada County, 58 Cal. 2d 56, 372 P. 2d 919	2
State *v.* Grove, 398 P. 2d 170 (Wash.)	2
Sheppard *v.* Maxwell 86 Sup. Ct. 1507	5
Irvin *v.* Dowd, 366 U.S. 717	5
Walker *v.* State, 239 Ark. 172, 388 S.W. 2d 13	5

Statutes:

Ark. Stat. Ann. §43-2010	2
Ark. Stat. Ann. §28-713	6

Annotations:

96 A.L.R. 2d 1224	2

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BRIEF

Before getting into the formal argument of the points presented in this case the State will make two observations concerning jurisdiction which will be prevalent in its discussion of appellant's separate points. These are:

1. This appeal does not present a substantial federal question, therefore, the appeal should be dismissed or the judgment affirmed.

2. Writ of Certiorari should be denied by this Court in its discretion because the points raised by appellant are not of sufficient importance for review.

With this preliminary statement in mind, we now turn to a discussion of the separate points presented by appellant.

I

Appellant asserts that *Ark. Stat. Ann.* §43-2010 is unconstitutional because it violates the constitutional provisions against self incrimination.

Statutes of this nature have been discussed by very few court decisions. The cases that appellee has found are annotated in 96 A.L.R. 2d 1224 under the title of "The Prosecution — Right To Discovery".

The annotation discusses cases which consider the federal procedure and cases from state courts considering the problem. The better reasoned cases hold that the prosecution has a right to discover an accused defendant's documents and it is not a violation of the constitutional right against self incrimination.

See: *United States* v. *Eli Lilly & Co.*, 24 F.R.D. 285 (1959, N.J.); *United States* v. *Woodner*, 28 F.R.D. 22 (1961, N.Y.); *Jones* v *Superior Court of Nevada County*, 58 Cal. 2d 56, 372 P. 2d 919; and *State* v. *Grove*, 398 P. 2d 170 (Wash.).

These cases are in accord with the holding of the Arkansas Supreme Court and there is no major conflict concerning these discovery statutes.

For the above reason this point does not present a substantial federal question. We also list other reasons why, under the particular facts of this case, this point does not present a question for review by this court.

1. Appellant admits that the discovery ballistics report was inconclusive. We submit that it was inconclusive and was not incriminating.

2. The ballistics report was not introduced in evidence in the trial so it did not incriminate anyone. It appears to us that it could only have been introduced by appellant's witness or as impeachment of appellant if he testified in his own behalf.

3. Appellant received the benefit of the statute when he discovered the prosecution's file. He should not now be allowed to complain that the prosecution also used it against him. There should be some mutuality.

4. The statute in this case and in future cases was and will be much more beneficial to an accused than it will be to the prosecution.

5. The Supreme Court of Arkansas thoroughly considered this point raised by appellant in its opinion and its per curiam order denying appellant's petition for rehearing and found it to be without merit.

We submit that this point is not substantial and is without merit.

II

This point concerning the misconduct of the trial judge does not raise a substantial federal question and

is not meritorious. This point was raised in the Arkansas Supreme Court and was fully considered by it in its opinion and its order denying appellant's petition for rehearing.

The laws of Arkansas adequately protect a criminal defendant and insure that he gets a fair and impartial trial and that he is accorded due process of law.

The Supreme Court of Arkansas has considered this problem many times. Our court will see to it that an accused defendant receives a fair trial. If an accused does not receive a fair trial, our court will reverse the case for a new trial and protect a defendant's rights.

It would be time and space consuming for us to state the reasons why we feel appellant was not deprived of due process of law. Suffice it to say, the reasoning given in the opinion by the Arkansas Supreme Court clearly shows that appellant was not deprived of any of his constitutional rights. (See pages 48-51 of Appellant's brief.)

We are sure that there are many cases which come to this court each year with this problem of misconduct of a trial judge involved. Appellant was adequately protected by our court and this point is not important enough to review.

III

All of the cases cited by appellant in his brief are not applicable to the facts in this particular case. The cases cited by appellant pertaining to evidence of convictions of other unrelated crimes. This was merely a

statement by the trial court of the disposition of the case on the first trial.

The Arkansas Supreme Court has considered this point many times before and its reasoning finding this point without merit is sound. This reasoning is set out on pages 52 and 53 of appellant's brief.

This point does not raise a substantial question for review.

IV

The cases of *Sheppard* v. *Maxwell* 86 Sup. Ct. 1507 and *Irvin* v. *Dowd,* 366 U.S. 717 do not apply here. The fact situations in those cases are in many ways different than the case at bar.

In those cases, the newspaper articles and publicity started at the very beginning of the commission of the crime and continued until the conviction. To outline the amount of publicity given to those trials would unduly lengthen this brief.

We agree with the holdings in those line of cases cited by appellant dealing with publicity which deny an accused a fair trial. But, those holdings do not apply here.

Perhaps, if appellant were complaining about the newspaper influence on the verdict of the jury in the first trial he would have a case. But, the point was not even raised in the first appeal to the Supreme Court of Arkansas. *Walker* v. *State,* 239 Ark. 172, 388 S.W. 2d 13.

We submit that the influence of the newspaper articles in 1963 (if they had any) was no longer a factor during the retrial of this case which was long after the case had been reversed and remanded by the Arkansas Supreme Court for a new trial.

Further, one newspaper editorial will not make a federal case out of a murder trial. This case falls far short of *Sheppard* and *Irvin*. There is no federal question here.

V

The Supreme Court of Arkansas upheld the trial court's ruling allowing the testimony of the two witnesses at the prior trial to be read to the jury and concluded that a proper foundation was laid.

We submit that the provisions of *Ark. Stat. Ann.* §28-713 were followed to the letter by the prosecution in reading the testimony to the jury. We contend that if there is compliance with the statute in admitting testimony at a prior trial in the present trial an accused is not denied any of his constitutional rights. The record simply will not bear out appellant's contention on page 33 of his brief. A proper foundation was laid.

It should be noted that on rehearing the Arkansas Supreme Court granted appellant leave to test this question in the trial court under Criminal Procedure Rule No. 1 of the Supreme Court of Arkansas. See page 62 of appellant's brief. But, appellant has elected to appeal to this court.

This point does not present a federal question.

VI

The State is hard pressed to see how appellant can complain that evidence was suppressed. As the Supreme Court of Arkansas noted he was allowed to inspect and copy all of the prosecution's tangible evidence.

Actually, what appellant is doing here, is making a jury argument to this court and attempting to point out discrepancies in the State's case. We admit the perfect case was not presented, but there is sufficient evidence to sustain a conviction of appellant.

The record does not support appellant's position and a jury argument to this court will not raise a federal question.

CONCLUSION

All of these questions were presented to the Supreme Court of Arkansas. They were fully considered and found to be without merit in the opinion and the order denying a rehearing.

We submit that the appeal should be dismissed or the judgment affirmed as there is no substantial federal question involved. Further, writ of certiorari should be denied by the court in its discretion.

Respectfully submitted,

JOE PURCELL

Attorney General

Attorney for Appellee